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No. 01-1201

In the

Supreme Court of the United States

CITY OF LAKEWOOD,

Petitioner,

vs.

FAIR HOUSING FOUNDATION OF LONG BEACH,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondent's brief in opposition to the City of Lakewood's Petition for Writ of Certiorari (the "opposition brief") makes numerous arguments that are not well taken and that have not been previously addressed by the parties or the courts.

First, the opposition brief focuses on evidentiary and law and motion standards, arguing that this Court should not interfere with the Ninth Circuit's finding that there were triable issues of fact that made it improper for the district court to grant summary judgment for the City of Lakewood (the "City"). This is beside the point because it is not the ground upon which certiorari is (or could be) sought.[1] Certiorari is sought because there is a *published* appellate court opinion, which constitutes binding precedent in the Ninth Circuit, that misstates and misapplies the law and is in conflict with other published circuit court opinions on important constitutional and statutory questions. *Walker and Fair Housing Foundation of Long Beach v. City of Lakewood*, 272 F.3d 1114 (9th Cir. 2001). In fact, it was only by ignoring this prior precedent -- including its own published opinion in *White v. Lee*, 227

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[1] As the Court is well aware, certiorari exists to allow review of important and broadly-applicable legal issues, not to resolve disputes between particular parties. Nonetheless, if this Court resolves the legal issues raised in the City's writ petition in its favor, there will be neither a basis for remand, nor factual issues to decide on remand.

F.3d 1214 (9th Cir. 2000) - - that the Ninth Circuit was able to rationalize its decision in this case. For example, the court had to completely overlook its holding in *White* that the "interference" clause of the Federal Fair Housing Act ("FHA") must be narrowly construed when applied to speech and *only* outlaws speech which is intended to incite and likely to incite imminent lawless activity. *Id.* at 1230. Rather than applying this well-established legal standard (which would have immunized the City from liability for its speech), the court instead held that the interference clause should be broadly construed, and that the alleged speech of City officials herein would violate that clause unless it also constituted "petitioning." *Walker, supra,* at 1129, n. 5.[2] In short, without any explanation for why it was doing so, the Ninth Circuit imposed a completely different standard on the City and its officials than it (and other circuit courts) had previously applied to determine whether speech violates the FHA. Moreover, although respondent tries to construct an after-the-fact rationale for this special rule based on the City's governmental position, there is no support for its argument in either the Ninth Circuit's opinion (which ignores *White* and is silent as to

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[2] Much of the speech at issue in *White* did not constitute an attempt to "petition the government for redress of grievances," but it was nonetheless deemed protected by the First Amendment because it did not advocate violence. *White, supra,* at 1221-22, 1230.

why the court created a special rule for the City[3]), or prior case law. *See, e.g., Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1093 (9th Cir. 2000) (rejecting assertion that government officials and entities are not entitled to First Amendment protections afforded private citizens).

Second, the opposition brief focuses on whether each of *the City's* alleged responses to respondent's speech/advocacy constitutes protected speech (as opposed to conduct), rather than on the dispositive issue before the Court, to wit, whether *respondent's* speech/advocacy is protected given *respondent's* policymaking status. The Ninth Circuit held that, because respondent was a policymaker, the City could not be held liable for *any* of its allegedly retaliatory responses to respondent's advocacy under the First Amendment. However, it nonetheless found that the City could be held liable for this *exact same* responsive conduct under the FHA. This holding flies in the face of the precise reason for the policymaker exception - - that "the effective operation of government would be compromised by requiring a public official to retain a

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[3] In fact, the Ninth Circuit's original opinion ignored the City's First Amendment rights altogether. Only on rehearing did the court recognize that City officials have First Amendment rights. However, it then limited and interpreted those rights in a way that was inconsistent with prior case law.

potential political enemy in a position of responsibility"[4] -- a policy concern which plainly applies irrespective of whether a claim is brought under the First Amendment or the FHA. Moreover, it is inconsistent and entirely nonsensical for the Ninth Circuit to, on the one hand (*i.e.*, in *White)*, hold that, if *nonviolent* discriminatory or retaliatory speech is curtailed by the FHA, the speaker has a cause of action under the First Amendment, and, on the other hand (*i.e.*, in *Walker*), to issue a decision that gives the object of nonviolent retaliatory or discriminatory speech a corollary and reciprocal right to sue the speaker under the FHA. *Compare*, *White, supra* at 1228-30 (plaintiffs whose non-violent but discriminatory speech is curtailed by threat of FHA liability can sue party making threat), with *Walker, supra* at 1129, n. 5 (FHA can be used to curtail speech unless it constitutes an attempt to petition the government for redress of grievances).[5]

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[4] *Pleva v. Norquist,* 195 F.3d 905, 912 (7th Cir. 1990).

[5] Respondent contends that the applicable case law establishes only that the City's alleged actions were not unlawful, not that its conduct was protected by the First Amendment. In reality, the cases establish that the City has a First Amendment right to refuse to associate with disloyal policymakers, as well as a right to assert that its own First Amendment rights are violated if the FHA is used as a tool to curtail its protected speech. *Pleva, supra,* at 912; *White, supra,*

Third, the opposition brief asserts that, taking the City's position to its logical extreme, a policymaking employee fired both for his or her race and in retaliation for speech could not assert a race discrimination claim under Title VII of the Civil Rights Act. This is another red herring unrelated to the issues presented to the Court. In this case, the Ninth Circuit held that retaliation *for advocacy or association* could violate the FHA but not the First Amendment, *i.e.*, the exact same conduct could trigger liability under one provision but not the other. This is entirely different from a situation where a party claims that he or she was retaliated against for something other than advocacy or association (*e.g.*, the *color of his or her skin*), and the policymaker exception does not apply in this latter situation.[6]

Fourth, the opposition brief implies (but does not actually state) that, in *Pleva v. Norquist*, 195 F.3d 905 (7th Cir. 1990), the Seventh Circuit dismissed the plaintiff's constitutional claims on grounds other than, and unrelated to, its finding that the plaintiff was a policymaker. This is,

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at 1128-1130.

[6] The antitrust cases cited by respondent (at pp. 14-15 of the opposition brief) are inapposite for this same reason, *i.e.*, they are not cases involving associational rights or constitutionally-permissible retaliation against a policymaker for speech or advocacy.

once again, inaccurate. The Seventh Circuit clearly held that the plaintiff could not assert a substantive due process or equal protection claim precisely because he was a policymaker, rejecting the former claim on the ground that "political disagreement was an appropriate basis" to refuse the plaintiff's request for re-appointment, and the latter claim on the ground that "where policymaking positions are concerned, it is wholly legitimate for a government official to use his discretionary appointment powers to reward his friends and keep his political enemies at a distance." *Id.* at 917. Moreover, none of the other decisions cited in respondent's opposition brief (at p. 10) are to the contrary, or suggest that the principles and rationale behind the policymaker exception do not apply outside the First Amendment context.[7] In contradistinction, the authorities cited in the City's Petition for Writ of Certiorari demonstrate that the courts have repeatedly applied the policymaker principles in cases that were not brought under the First Amendment, for example, in cases where ideologically disloyal or disruptive

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[7] The policymaker principles simply were not implicated in the cases cited by respondent, except in the First Amendment context, because the plaintiffs' other claims either did not seek redress for retaliation based on association or advocacy, or were procedural due process claims that only analyzed the technical aspects (the adequacy of the notice and hearing provided), rather than the substantive propriety, of the plaintiffs' terminations.

employees have sought redress for their terminations under Title VII of the Civil Rights Act. [*See*, the City's Petition for Writ of Certiorari, at pp. 16-17.]

Fifth, as previously discussed, the opposition brief focuses on each of the City's alleged retaliatory responses to respondent's advocacy and analyzes whether a particular response constitutes speech protected by the First Amendment. Not only is this analytical focus misplaced for the reasons explained above, it is fatally flawed for two additional reasons. As a threshold matter, respondent's assertion that conduct such as writing letters or complaining about respondent's conduct is not protected speech ignores the entire body of First Amendment law, as well as the Ninth Circuit's decision in *White* that such speech is protected under the FHA as long as it is nonviolent. Moreover, respondent's argument ignores the fact that the First Amendment has both a speech and an association clause. Conduct such as the City's exercise of its contractual right to evaluate whether respondent was performing its agreed-upon professional obligations, a City official's exercise of her First Amendment right to attend public meetings held by respondent, and the determination of City officials that the City should not continue to associate with respondent after its contract expired given respondent's attempt to sue the City and covert association with the law firm suing the City, may not constitute speech. However, these acts do constitute the exercise of protected First Amendment associational rights, to wit, the right *not*

to associate with political or ideological opponents who seek to undermine the effective operation of government. *Pleva, supra,* at 912.

In summary, the instant case is a classic example of a situation in which the grant of certiorari is both necessary and appropriate. The Ninth Circuit's published decision herein is in conflict with prior Circuit Court decisions, and misstates and misconstrues the law on vitally important constitutional and statutory issues. Accordingly, the City of Lakewood respectfully requests that this Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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